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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 JONATHAN W. MCKINNEY,

10 Plaintiff,

11 v.

12 C/O JOHN MILLS,

13 Defendant.

No. C08-5720 BHS/KLS

REPORT AND RECOMMENDATION
Noted for: December 4, 2009

14 Presently before the Court is the Motion to Dismiss of Defendant Corrections Officer
15 John Mills. Dkt. 13. Defendant claims that Plaintiff Johnathan W. McKinney's complaint
16 should be dismissed pursuant to Rule 12(b)(6), because Plaintiff has failed to exhaust his
17 administrative remedies, has failed to state a claim on which relief can be granted, and lacks
18 standing as to some of the remedies he seeks. *Id.* Mr. McKinney filed a response and motion for
19 leave to file a second amended complaint. Dkt. 25.

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21 For the reasons stated below, the Court recommends that the motion to dismiss be
22 granted on the grounds that Mr. McKinney has failed to exhaust his administrative remedies.

23 **BACKGROUND**

24 Mr. McKinney filed his motion for leave to proceed *in forma pauperis* and proposed
25 complaint on November 25, 2008. Dkt. 1. On December 12, 2008, the court ordered Mr.
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1 McKinney to file an amended complaint or show cause why certain claims should not be
2 dismissed. Dkt. 5. Mr. McKinney filed a First Amended Complaint on December 29, 2008.
3 Dkt. 6. After review, the court found that Mr. McKinney had complied with the court's order,
4 but that the First Amended Complaint contained an additional pleading deficiency. Mr.
5 McKinney added the Pierce County Sheriff's Department as a defendant in the First Amended
6 Complaint, but included no factual allegations describing how his civil rights were violated by
7 any official policy or practice of the department. Dkt. 7. The court again ordered Mr. McKinney
8 to file an amended complaint or show cause why his claims against the Pierce County Sheriff's
9 Department should not be dismissed. Dkt. 7. Mr. McKinney did not respond. The court
10 recommended, and the district judge agreed, that Mr. McKinney had failed to state a claim
11 against Defendant Pierce County Sheriff's Department and that this case shall proceed only
12 against Defendant John Mills. Dkts. 8 and 9.

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15 Mr. McKinney alleges that Defendant Mills, a corrections officer at the Pierce County
16 Jail ("PCDCC") was arguing with another inmate in front of him and Mr. McKinney jokingly
17 said "Ya Boner!" to Defendant Mills. Dkt. 6, p. 3. He alleges that Defendant Mills then
18 "smacked [him] in the back of the head, hard enough to slam [his] teeth together." *Id.* Mr.
19 McKinney further alleges that during the end of 2007 into the first part of 2008, he observed that
20 whenever any inmates were patted in or out of the cell by Defendant Mills, they were subjected
21 to very hard slaps to the chest, abdomen and rib cage area. *Id.*

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23 Mr. McKinney was subsequently transferred to the Shelton Detention Center (Dkt. 11)
24 and is now incarcerated at the McNeil Island Corrections Center (MICC) . Dkt. 20.

25 Mr. McKinney asks the court to: 1) direct the firing of Defendant Mills and ensure that he
26 is never again "granted a position of authority;" (2) award \$500,000.00 for mental anguish, pain

1 and suffering and cruel and unusual punishment; and (3) release him from the Pierce County Jail
2 pending trial on his “alleged forgery charge.”¹ Dkt. 6, p. 4.

3 STANDARD OF REVIEW

4 Fed. R. Civ. P. 12 motions to dismiss may be based on either the lack of a cognizable
5 legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri*
6 *v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken
7 as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d
8 1295 (9th Cir. 1983). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not
9 need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement
10 to relief requires more than labels and conclusions, and a formulaic recitation of the elements of
11 a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007)
12 (internal citations omitted). “Factual allegations must be enough to raise a right to relief above
13 the speculative level, on the assumption that all the allegations in the complaint are true (even if
14 doubtful in fact).” *Id.* at 555. Plaintiffs must allege “enough facts to state a claim to relief that is
15 plausible on its face.” *Id.* at 570.

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18 Two working principles underlie the Supreme Court’s decision in *Bell Atlantic*; first, the
19 tenant that a court must accept a complaint’s allegations as true is inapplicable to threadbare
20 recitals of a cause of action’s elements, supported by mere conclusory statements. *Ashcroft v.*
21 *Iqbal*, 129 S.Ct. 1937, 1949-50 (2009) (citing *Twombly*, 550 U.S. at 555). Second, determining
22 whether a complaint states a plausible claim is context-specific, requiring the viewing court to
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24 ¹ This last request is moot as Plaintiff has already been convicted. Dkt. 13, p. 3 n 1 and Appendix (containing
25 verdict form, warrant of commitment and Judgment and Sentence in *State v. McKinney*, Pierce County Superior
26 Court Case No. 08-1-04728-0. The court may take judicial notice of court records. *MGIC Indem. Co. v. Weisman*,
803 F.2d 500, 504 (9th Cir.1986); *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir.1980).

1 draw on its own experience and common sense. *Id.* (citing *Twombly*, 550 U.S. at 556). A court
2 considering a motion to dismiss may begin by identifying allegations that, because they are mere
3 conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the
4 complaint's framework, they must be supported by factual allegations. When there are well-
5 pleaded factual allegations, a court should assume their veracity and then determine whether they
6 plausibly give rise to an entitlement to relief. *Iqbal*, 129 S.C. at 1948-51.

8 A complaint should not be dismissed under Fed. R. Civ. P. 12(b)(6), furthermore, “unless
9 it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which
10 would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Before the court
11 “may dismiss a pro se complaint for failure to state a claim, it “must provide the pro se litigant
12 with notice of the deficiencies of his or her complaint and an opportunity to amend the complaint
13 prior to dismissal.” *McGuckin v. Smith*, 974 F.2d 1050, 1055 (9th Cir. 1992); see also *Noll v.*
14 *Carlson*, 809 F.2d 1446, 1449 (9th Cir. 1987). However, leave to amend need not be granted
15 where amendment would be futile or the amended complaint would be subject to dismissal. *Saul*
16 *v. United States*, 928 F.2d 829, 843 (9th Cir. 1991).

18 DISCUSSION

19 By the Prison Litigation Reform Act of 1995 (PLRA), Congress amended 42 U.S.C. §
20 1997e to provide that “[n]o action shall be brought with respect to prison conditions under
21 section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or
22 other correctional facility until such administrative remedies as are available are exhausted.” 42
23 U.S.C. § 1997e(a). The exhaustion requirement “applies to all inmate suits about prison life,
24 whether they involve general circumstances or particular episodes, and whether they allege
25 excessive force or some other wrong.” *Porter v. Nussle*, 532 U.S. 516, 532 (2002).

1 The Supreme Court has ruled that exhaustion of prison administrative procedures is
2 mandated regardless of the relief offered through such procedures. *Booth v. Churner*, 532 U.S.
3 731, 741 (2001). The Supreme Court has also cautioned against reading futility or other
4 exceptions into the statutory exhaustion requirement. *Id.* at 741 n.6. Moreover, because proper
5 exhaustion is necessary, a prisoner cannot satisfy the PLRA exhaustion requirement by filing an
6 untimely or otherwise procedurally defective administrative grievance or appeal. *Woodford v.*
7 *Ngo*, 548 U.S. 81, 92-93 (2006).

9 The PLRA exhaustion requirement is not jurisdictional but rather creates an affirmative
10 defense that a defendant may raise in a non-enumerated Rule 12(b) motion. *Jones v. Bock*, 549
11 U.S. 199, 216 (2007) (“[I]nmates are not required to specially plead or demonstrate exhaustion in
12 their complaints.”); *Wyatt v. Terhune*, 315 F.3d 1108, 1117-19 (9th Cir.), *cert. denied sub nom.*
13 *Alameida v. Wyatt*, 540 U.S. 810 (2003). The defendants bear the burden of raising and proving
14 the absence of exhaustion. *Wyatt*, 315 F.3d at 1119.

16 “In deciding a motion to dismiss for a failure to exhaust nonjudicial remedies, the court
17 may look beyond the pleadings and decide disputed issues of fact.” *Id.* “I[f] the district court
18 looks beyond the pleadings to a factual record in deciding the motion to dismiss for failure to
19 exhaust – a procedure closely analogous to summary judgment – then the court must assure that
20 [the prisoner] has fair notice of his opportunity to develop a record.” *Id.* at 1120 n. 14. When
21 the district court concludes that the prisoner has not exhausted administrative remedies on a
22 claim, “the proper remedy is dismissal of the claim without prejudice.” *Id.* at 1120. *See also*
23 *Lira v. Herrera*, 427 F.3d 1164, 1170 (9th Cir. 2005), *cert. denied* 549 U.S. 1204 (2007). On the
24 other hand, “if a complaint contains both good and bad claims, the court proceeds with the good
25 and leaves the bad.” *Jones*, 549 U.S. at 221.

1 In this case, there is no dispute that there is a grievance process at PCDCC and that Mr.
2 McKinney did not file a grievance. Dkt. 6, p. 2. In his complaint, Mr. McKinney noted that
3 there is a grievance procedure available at PCDCC and that he did not file any grievances
4 concerning the facts relating to this complaint. *Id.* In explanation, Mr. McKinney states:
5 “Complaint filed on 11-02-08. It’s still under investigation by Lt. Sperling. Grievance form not
6 given to me.” *Id.*

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8 A search of PCDCC’s records confirms that the only grievance filed by Mr. McKinney
9 was unrelated to the facts in this lawsuit. Dkt. 22, Exh. A.

10 According to the Prison Information Handbook given to all inmates of the PCDCC, Mr.
11 McKinney’s first step in the grievance process is to request a grievance form from the Housing
12 Officer. Dkt. 22, Exh. B. Mr. McKinney did not do so and instead contacted the Floor Sergeant,
13 Sgt. Steve Jones. *Id.* At Sgt. Jones’s request, Mr. McKinney completed a “Handwritten
14 Statement Form,” as part of PCDCC’s internal investigation into Mr. McKinney’s complaint.
15 *Id.*; Dkt. 6, p. 2. The Handwritten Statement resulted in a departmental investigation of
16 Defendant Mills. Dkt. 14, p. 2, Exh. D. At the conclusion of the investigation, Mr. McKinney’s
17 complaints were sustained and Mr. Mills was given a written reprimand on February 5, 2009,
18 stating in part:

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20 This letter constitutes a letter of one written reprimand relative to the allegations
21 contained in both IPR 08-238 and IPR 08-241 regarding the following
22 Department Manual violations of Pierce County Sheriff’s Department; Use of
23 Force 3.05.010, Courtesy 3.02.280, and Treatment of Persons in Custody
3.02.570.

24 This disciplinary action is taken in view of the fact that the allegation of
25 Department Manual violation, Courtesy 3.02.280 was sustained.

26 Dkt. 14, Exh. D.

1 Mr. McKinney filed his complaint in this action on December 29, 2008, before PCDCC's
2 internal investigation had been completed.

3 One of the purposes of the PLRA's exhaustion requirement is to afford corrections
4 officials an opportunity to address complaints internally. 42 U.S.C. § 1997e(a). When Mr.
5 McKinney completed his handwritten statement, this purpose was arguably met as the statement
6 resulted in a department investigation of Defendant Mills and a written reprimand. However, the
7 record is clear that Mr. McKinney did not avail himself of the available grievance procedures,
8 including all levels of appeals available to him upon receipt of responses to his grievances. Most
9 importantly, Mr. McKinney did not wait until PCDCC's investigation of the matter was
10 concluded prior to filing his complaint in this action; a complaint which asks that additional
11 administrative personnel action be taken against Defendant Mills.
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13 Inmates must pursue all levels of administrative review to satisfy the requirements of §
14 1997(e) in a timely manner. *White v. McGinnis*, 131 F.3d 593 (5th Cir. 1997). Mr. McKinney
15 has not done so. Section 1997e(a) does not say that exhaustion of administrative remedies is
16 required *before* a case may be decided. It says, rather, that “ [n]o action shall be brought with
17 respect to prison conditions ... until such administrative remedies as are available are exhausted.”
18 Congress could have written a statute making exhaustion a precondition to judgment, but it did
19 not. The actual statute makes exhaustion a precondition to suit. *McKinney v. Carey*, 311 F.3d
20 1198, 1199-1201. Requiring dismissal without prejudice when there is no presuit exhaustion
21 provides a strong incentive that will further the Congressional objectives to reduce the quantity
22 and improve the quality of prisoner suits, while permitting exhaustion *pendente lite* will
23 inevitably undermine attainment of them. *Id.*
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1 Thus, Mr. McKinney was not excused from complying with PCDCC's established
2 grievance procedures. Accordingly, the evidence reflects that Mr. McKinney filed this lawsuit
3 prematurely and has not yet fully exhausted his administrative remedies. Claims that are not
4 exhausted must be dismissed and this court lacks discretion to resolve those claims on the merits.
5 See e.g., *McKinney*, 311 F.3d 1198.

6 CONCLUSION

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8 For the reasons stated above the Court should **GRANT** Defendant Mill's motion to
9 dismiss (Dkt. 13) and Plaintiff's Complaint (Dkt. 6) should be **DISMISSED WITHOUT**
10 **PREJUDICE**. Mr. McKinney's motion for leave to file an amended complaint (Dkt. 25) should
11 also be **Denied** in light of the dismissal without prejudice.

12 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil
13 Procedure, the parties shall have ten (10) days from service of this Report and Recommendation
14 to file written objections. See also Fed. R. Civ. P. 6. Failure to file objections will result in a
15 waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985).
16 Accommodating the time limit imposed by Rule 72(b), the Clerk is directed to set the matter for
17 consideration on **December 4, 2009**, as noted in the caption.
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20 **DATED** this 11th day of November, 2009.

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24 Karen L. Strombom
25 United States Magistrate Judge
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